AMINAH v. SUPERINTENDENT OF PRISON, PENGKALAN CHEPA, KELANTAN

[O.C.J. (Wan Suleiman J.) October 28, 1967]

[Kota Bharu — Originating Motion No. 11 of 1967]

Constitutional Law — Fundamental liberty — Preventive detention — Duty to inform as soon as may be of grounds of arrest — Habeas corpus — Bona fides of detention — Detention under Restricted Residence Enactment (Cap. 39) — Constitution of Malaysia, arts., 5(3) & (4) and 162(6).

Criminal Law and Procedure — Habeas corpus — Affidavit — Detainee not filing himself — "Other sufficient cause" — Criminal Procedure Code (Cap. 6) ss. 366 & 367.

Where a detainee is being held in a prison, the inconvenience and possible delay in either getting him before a commissioner of oaths, or alternatively of getting the latter to visit the prison amounts to "other sufficient cause" for the detainee himself not filing the affidavit in support of an application for *habeas corpus*.

One Haron was detained under the Restricted Residence Enactment. An application by originating motion was made by his wife for issue if a writ of *habeas corpus* challenging the detention on the ground that there had been non-compliance with article 5(3) of the Federal Constitution in that the detainee had not been informed "as soon as may be of the grounds of his arrest."

The applicant's counsel urged that the power to detain was exercised *mala fide* by the authority, in consequence the court had jurisdiction to look into and examine whether the grounds for arrest were reasonable.

Held: (1) as in supporting affidavit the applicant had deposed that when she saw the detainee a few hours after his arrest he was fully informed by the police and knew the reasons for his arrest, this satisfied the requirement of article 5(3) of the Constitution which applies to arrest made under any law including Restricted Residence Enactment in this case. *Chia Khin Sze* v. *Mentri Besar of Selangor* (4) dissented from;

(2) the legal position is that detention order must be in exercise of a valid legal power. Once this is shown it is for the detainee to show that the power was exercised improperly. Thus the applicant in this case failed to discharge the onus cast upon her.

Cases referred to:—

(1) *Vimal Kishore* v. *State of U.P.* A.I.R. 1956 All. 56 at p. 59.

(2) *Madhu* v. *State* A.I.R. 1959 Punj. 506.

(3) *Tarapade* v. *State of West Bengal* [1959] S.C.R. 212.

(4) *Chia Khin Sze* v. *The Mentri Besar of Selangor* [1958] M.L.J. 105.

ORIGINATING MOTION.

Dato' Wan Mustapha for the applicant.

Wan Ismail bin Wan Mohamed Salleh (Sr. Federal Counsel) for the respondent.

Cur. Adv. Vult.

Wan Suleiman J.: This is an application by Aminah binti Haji Mamat, for a writ of *habeas corpus* on behalf of her husband, Haron bin Jaffar, who is at the moment being detained at the Pengkalan Chepa Prison, Kelantan.

The learned deputy public prosecutor on behalf of respondent raised a preliminary point of law. He contended that the procedure as laid down by sections 366 and 367 of the Criminal Procedure Code (Cap. 6) had not been observed in that the affidavit sworn by applicant did not show cause why the detainee himself had not filed an affidavit. However, it was never in dispute that the detainee was being held in Pengkalan Chepa Prison. The inconvenience and possible delay in either getting the detainee before a commissioner of oaths, or alternatively, of getting the latter to visit the prison, amounts, in my opinion, to "other sufficient cause" for the detainee himself not filing the affidavit and I accordingly held that, in the circumstances, there had been compliance with section 366 of the Criminal Procedure Code.

Coming to the substantive issues of law raised by counsel for the applicant, I shall first consider the contention that there had been non compliance with article 5(3) of the Constitution in that the detainee had not been "informed as scon as may be of the grounds of his arrest."

Counsel then referred to article 22(1) of the Indian Constitution, which is indeed substantially the same as our article 5(3). At page 104 of Volume 2 of the 5th Edition of *Basu's* Commentary on the Constitution of India, under the heading "Right to be informed of the grounds" appears the following passage:—

> "Hence, though it is not necessary for the authorities to furnish full details of the offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. The ground to be communicated to the arrested person should be somewhat similar to the charge framed by the court for the trial of a case. Thus, merely to inform the person that he has been arrested under section 7 of the Criminal Law Amendment Act, 1932, without giving any particulars of the alleged acts for which such action has been taken against him, is not sufficient compliance with article 22(1)." (*Vimal Kishore* v. *State of U.P.*(1) and *Madhu* v. *State* (2)).

The authority cited for this proposition — *Vimal Kishore* v. *State of U.P.*(1) — concerns a criminal charge against the person detained, but the right to be informed of the grounds of arrest, in my view, also exists where the arrest is under the Restricted Residence Enactment. Dato' Wan Mustapha for applicant then referred to paragraphs 3 and 4 of the affidavit dated 11th September, 1967 of A.S.P. Gill the officer who had made the arrest. That affidavit states that the detainee, on being arrested, had merely been told that he was being detained under the Restricted Residence Enactment (F.M.S. Cap. 39). It was also mentioned therein that the detainee had been shown the warrant of arrest and detention (Form A), the contents of which had then been explained to him. In paragraph 4, Mr. Gill specifically denied having given the detainee or anyone else the grounds for his arrest.

Be that as it may, it would appear that some

hours after the arrest, applicant saw the detainee who was not only aware that he was being detained under the Restricted Residence Enactment, but also added that the police had told him further that the grounds for his detention were, to quote paragraph 10 of her affidavit:—

"(i) that he enticed away another man's wife;

(ii) that he was involved in theft;

(iii) that people were scared of him;

(iv) that he was a gangster."

As was held in the Indian case of *Tarapade* v. *State of West Bengal,*[3] the words "as soon as may be" appearing in article 22(1) of the Indian Constitution (and article 5(3) of ours) means as nearly as is reasonable in the circumstances of the particular case. The applicant cannot be heard to deny what she had deposed to in her affidavit, and though what A.S.P. Gill told the detainee may not be sufficient grounds, what he had been told by some other member of the police force a few hours later would satisfy the requirement of article 5(3).

It was also urged by learned counsel for the applicant that the Restricted Residence Enactment is in conflict with the constitution and therefore void because it does not contain any provision similar to article 5(3) thereof.

Before proceeding any further, I must make it clear that I have considered the decision of Sutherland J. in the case of *Chia Khin Sze* v. *The Mentri Besar of Selangor* [4] wherein the learned judge held, *inter alia,* that article 5(4) was intended to apply to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment and that article 5(3) does not apply to cases under the Enactment. I would, with great respect, say that I am unable to agree with this decision. Article 5 is clearly meant to apply to arrests under any law whatsoever in force in this country.

However, it would be absurd to suggest that the absence of any provision similar to article 5(3) would make the whole Enactment void. The proper approach is for the court to apply article 162(6) which reads:—

"Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

Accordingly, there should be read into the enactment the right of an arrested person to be informed within a reasonable time of the grounds of his arrest.

Another issue of importance raised by applicant's counsel is that the power to detain has been exercised *mala fide* and in consequence this court has jurisdiction to look into and decide whether the grounds for his arrest are reasonable.

Again I must rely on the same volume of *Basu's* Commentary for assistance. Under the heading "Onus where imprisonment or detention is challenged," at pages 90 and 91 appears the following passage:—

"Where a person who has been deprived of his liberty challenges the detention by a petition for *habeas corpus,* it is for the authority who has detained him to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detenu to show that the power has been exercised *mala fide* or improperly."

As regards the first requirement, I am satisfied that the detention had been in the exercise of a valid legal power. In the warrant of arrest and detention issued under section 2 of the Restricted Residence Enactment produced before me, the Minister concerned declared that he had reasonable grounds to believe that an order made under section 2(ii) of the Enactment, an order for Restricted Residence should be issued.

The onus now lies upon the detainee to show that such power had been exercised *mala fide.* In this connection *Basu's* Commentary goes on to say:—

" 'Bad faith' in the present context has been interpreted to mean 'malice in law', i.e., inflicting a wrong or injury upon another person in contravention of the law, even though it may be without any malicious intention. Good faith is obviously wanting where there is a 'fraud on the statute', i.e., a misuse of the statute for a collateral purpose or a purpose other than that for which it was intended, — or, in other words, a 'colourable use' of the statute.

(a) When the condition precedent required by the statute is objective, the existence or not of the objective condition or facts and circumstances can be tested by the courts, viz., whether the circumstances which called for the issue of the order existed in fact.

(b) But where the condition is subjective, viz., the state of the mind of the authority issuing the order, "he is alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone but himself that these circumstances constituted a reasonable cause and belief"; in other words, the existence of the circumstances which called for the order cannot be questioned by the courts in this latter (subjective) case, and the only question left to the court is whether the authority exercised the power in good faith. The court cannot undertake an investigation as to the sufficiency of the materials on which such satisfaction was grounded.

In a case of subjective satisfaction, the sufficiency of the grounds which gave rise to the satisfaction of the authority is not a matter for determination of the court, for, one person may be, though another may not be, satisfied on the same grounds.

Where the authority is empowered to make an order upon a subjective condition, i.e., a particular state of his mind, e.g., 'on being satisfied' or 'having reasonable grounds for believing' that certain facts exist, — once an order asserting that state of mind and belief has been proved in a valid form, by production of a duly authenticated order, the onus is on the person challenging the *bona fides* of the order to disprove the existence of that state of mind. The onus is obviously more difficult than

that of disproving an objective fact. Mere evidence of the applicant that he does not know that there are any reasons for the authority's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call on the authority to explain and justify the assertion of his order."

Applicant in her affidavit merely asserts that she does not know that there are any reasons for the Minister's belief, and at the same time denies that there are or can be any reasons for such belief. This, in my view, is clearly insufficient to discharge the onus cast upon her.

Accordingly, I dismiss the application.

Application dismissed.

Solicitors: *Wan Mustapha & Co.*

RE JIMMY LOH HUAN MOH

[F.C. (Pike C.J. (Borneo), Gill & Chang Min Tat JJ.) October 31, 1967]

[Jesselton — Federal Court Civil Appeal No. X.11 of 1967]

*Advocates & Solicitors — Admission — Appeal by qualified person from decision of judge refusing to admit him to roll of advocates in Sabah — Whether judge satisfied that appellant normally resident in Sabah — Whether enrolment to be decided by immigration laws — Advocates Ordinance (Sabah Cap. 2) *ss. 4(2)(c)(i) & 6.*

The appellant who possessed a professional qualification rendering him eligible to be admitted to the roll of advocates in Sabah, appealed against the refusal of the Senior Judge in Sabah to make an order under section 6 of the Advocates Ordinance directing that his name be entered on the roll of advocates kept by the Deputy Registrar in Borneo at Jesselton on the grounds that: (a) the learned judge erred in holding that the appellant had not been normally resident in Sabah within the meaning of section 4(2)(c)(i) of the Ordinance for the requisite period of six months, and (b) the learned judge erred in holding that eligibility for enrolment on the roll of advocates was to be decided by the immigration laws.

Held: (1) the appellant must be able to satisfy the learned senior judge that his residence in Sabah was intended to be as permanent and continuous as anything can be and that he had no present intention of ceasing to be so resident and that at the date of his application he had been so resident for a period of six months. On the evidence the court could not say that the learned senior judge had erred in his decision that he was not so satisfied;

(2) in considering an application under the Advocates Ordinance for admission to the roll no regard ought to be had to the immigration status of the applicant. The fact that he had not been given any guarantee of extended stay by the immigration authorities was not a ground upon which his admission to the roll of advocates could be refused;

(3) the appellant had failed to show that the learned judge was guilty of an erroneous exercise of the discretion vested in him by section 6 of the Ordinance and the appeal should be dismissed.

Per Pike C.J.: "I find it difficult to construe the expression 'normally resident'. With respect to the learned judge I do not consider that it means continuous physical residence without any absences from the State. But the onus is on the applicant to show that he has been normally resident. I am satisfied that it does not mean that an applicant can have two residences, one within and one without the State."

FEDERAL COURT.

K. S. Reddi for the appellant.

Charles Ho (State Counsel) as *amicus curiae.*

The judgments were delivered on October 31, 1967 at Kuching.

Pike C.J. (Borneo): Mr. Loh Huan Moh appeals against the refusal of the learned Senior Judge in Sabah to make an order under section 6 of the Advocates Ordinance, Sabah, directing that his name be entered on the roll of advocates kept by the Deputy Registrar of the High Court in Borneo at Jesselton.

His grounds of appeal are set out in the memorandum of appeal but counsel for the appellant contented himself with arguing two main grounds, namely —

(a) that the learned judge erred in holding that the appellant had not been normally resident within the meaning of section 4(2)(c)(i) of the Advocates Ordinance (Cap. 2) for the requisite period of six months; and

(b) that the learned judge erred in holding that eligibility for enrolment on the roll of advocates is to be decided by the immigration laws.

As to (a): It was not in dispute that Mr. Loh possessed a professional qualification rendering him eligible to be admitted to the roll of advocates or that he exhibited two recent testimonials as to his good character. *Prima facie,* therefore, he complied with the requirements of section 5(1) of the Ordinance and he also complied with section 5(2) in that he delivered a copy of the application for admission and of the documents in support to the State Attorney-General.

Counsel argued that the learned judge should, under section 6, have been satisfied that he was eligible by reason of possessing suitable professional qualifications and having been normally resident in Sabah for the required

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* Sections 4(2)(c)(i) and 6 of the Advocates Ordinance (Sabah Cap. 2) read as follows:

"4(2). A person having any of the qualifications mentioned in sub-section (1) shall be eligible to be admitted as an advocate if he satisfies the Chief Justice that:—

(c) that (i) he has been normally resident in Sabah for the period of six months immediately preceding the date of his application under section 5;

.....

6. If the Chief Justice is satisfied that —

(a) an application under section 5 is eligible under section 4 to be admitted as an advocate;

(b) that he is in all respects a fit and proper person to be so admitted,

he shall by order direct that upon payment of the prescribed fee the Registrar shall cause the name of the applicant to be entered on the roll".